of objects not entrusted to the government; it would become the painful duty of this tribunal, should a case requiring such a decision come before it, to say that such an Act was not the law of the land. . . . ."

Ludwik Ehrlich.

University of California.
Berkeley, California, November 17, 1919.

Comment on Recent Cases

ADMINISTRATIVE LAW: THE FEDERAL TRADE COMMISSION: UNFAIR COMPETITION.—On September 26th, 1914, the President approved the act of Congress creating the Federal Trade Commission,[1] wherein it was provided that the President, with the consent of the Senate, should appoint five commissioners to hold office for designated periods, and to wield the powers set forth in the act.

Following various preliminary provisions and definition of a very few of the terms thereinafter employed,[2] the act goes on to state that "Unfair methods of competition in commerce are hereby declared unlawful," and to direct the commission to prevent indulgence therein by "persons, partnerships, or corporations, except banks, and common carriers subject to the Acts to regulate commerce." This result the commission is to accomplish in the following manner: "Whenever it shall have reason to believe that any person . . . . has been or is using any unfair method of competition in commerce, and if it shall appear to the commission that a proceeding by it in respect thereof would be of interest to the public, it shall issue and serve . . . . a complaint . . . ." upon the offending party, citing him to appear at a designated time and place, there to show cause why he should not be compelled to desist from the practices set forth and described. Any person, partnership, or corporation, upon cause shown, "may be allowed"[3] to intervene and appear. The commission then conducts a hearing. Extremely wide powers are conferred upon it in the matter of compelling the attendance of witnesses and of procuring documentary and other evidence,[4]

[1] An act to Create a Federal Trade Commission, etc., Act of Sept. 26, 1914; 38 U. S. Stats. at L. 717, U. S. Comp. Stats. (1918), § 8836a.

[2] See infra, n. 8.

[3] Probably means "must be allowed." Harvey and Bradford, Federal Trade Commission Manual, p. 25, citing Commerce Commission v. Humboldt (1911) 224 U. S. 484, 56 L. Ed. 849, 32 Sup. Ct. Rep. 556.

[4] "Such attendance of witnesses, and the production of such documentary evidence may be required from any place in the United States, at any designated place of hearing," this with reference "to any matter under investigation." 38 U. S. Stats. at L. 722, U. S. Comp. Stats. (1918), § 8836i.

and it may invoke the process of the district courts to sanction the authority so granted.[5]

Following the hearing the commission may, if it be of opinion that "the method of competition is prohibited by this Act," issue an order commanding the party to desist therefrom. In event of failure to comply with the order the commission may file with the circuit court of appeals for the appropriate circuit an application for its enforcement, accompanying the same with a transcript of the record of the hearing. The circuit court of appeals then undertakes the enforcement of the order, first making modifications if it chooses to do so. Review by the circuit court of appeals may be had upon written application of the party against whom the commission's order is directed. Review by the Supreme Court is obtainable by certiorari under section two hundred and forty of the Judicial Code.

Upon the commission also are bestowed the widest investigatory powers.[6] Causes arising under the anti-trust acts may be submitted by the court to the commission for action by the latter as master in chancery. Certain portions of the field of foreign commerce fall within the purview of the commission by reason of legislation enacted in 1916 and 1918.[7]

The Federal Trade Commission, therefore, is a tribunal which, after collecting its own information, drawing its own complaint, serving its own summons, and conducting the ensuing trial in accordance with its own rules of evidence, may then invoke the process of the circuit court of appeals to enforce the judgment which it hands down. The natural question is as to the principle from which its powers flow and the limitations thereupon.

The legislative language from which these powers are derived is neither precise nor definite. Cursory though the above survey may seem, it nevertheless touches upon all the material portions of the act. "Unfair methods of competition in commerce are . . . . unlawful;" investigation by the commission is to occur whenever it "shall have reason to believe" that any such method is being employed; and if, thereupon, "the commission shall be of the opinion that the method of competition in question is prohibited by this Act," it is to forbid the further use thereof. Apart from questions involving the investigatory

[5] 38 U. S. Stats. at L. 722, U. S. Comp. Stats. (1918), § 8836i.

[6] 38 U. S. Stats. at L. 721, U. S. Comp. Stats. (1918), § 8836g. Many of the functions of the trade commission along this line had formerly been exercised by a body which the trade commission supplanted, the Bureau of Corporations. Cf. 32 U. S. Stats. at L. 827, 10 Fed. Stats. Ann. 61.

[7] See 39 U. S. Stats. at L. 798, U. S. Comp. Stats. (1918), §§ 8836l-r, incl; Act of April 10, 1918, ch. 50, U. S. Comp. Stats. (1918) §§ 8836 1/4a-8836 1/4e, incl.

powers of the commission, which are foreign to present purposes, the problem reduces itself to this: What is meant by "unfair methods of competition in commerce?" "Commerce" refers to interstate commerce; beyond that the statute itself affords no light.[8]

Examination into the circumstances surrounding the passage of the statute discloses one fact of prime importance: Congress did not intend to limit the powers of the commission within the common law conception of "unfair trade." "Unfair trade" is an expression with a definite legal meaning.[9] Generally speaking it refers to all those trade practices whereby one passes off his goods as those of another, and these will be enjoined.[10] But, in the present state of the authorities, the doctrine of unfair trade does not extend beyond the idea of "passing off."[11] By deliberate avoidance of the expressioon "unfair trade"[12] it would seem clear that Congress intended a departure from common law rules. But in the absence of further statement of congressional intent, query as to the extent of the departure which it undertook to effect?

In *Sears, Roebuck & Company v. Federal Trade Commis-*

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[8] 38 U. S. Stats. at L. 719, U. S. Comp. Stats. (1918) § 8836d. This section undertakes the definition only of the following expressions: commerce, corporation, documentary evidence, acts to regulate commerce, and anti-trust acts. Further definition is attempted in no portion of the act.

[9] Until very recent years it has been the custom both for the text-writers and the digest-makers to treat the law of unfair trade as a portion of the law of trade-marks. Unfair trade was, however, an expression well known to the common law. See infra, n. 10. And it is now recognized that the law of unfair competition is the genus and the law of trade-mark the species. Hanover Milling Co. v. Metcalf (1915) 240 U. S. 403, 413, 60 L. Ed. 713, 36 Sup. Ct. Rep. 357.

[10] The historical development of the doctrine has been traced and the authorities collected by the writers in the various legal periodicals. See particularly four articles by E. S. Rogers: Comments on the Modern Law of Unfair Trade, 3 Illinois Law Review, 551; The Ingenuity of the Infringer and the Courts, 11 Michigan Law Review, 358; Unfair Competition, 17 Michigan Law Review, 490; Predatory Price Cutting as Unfair Trade, 27 Harvard Law Review, 139; and Charles Grover Haines, Efforts to Define Unfair Competition, 29 Yale Law Journal, 1. Earlier articles are the Prevention of Unfair Competition in Business, 5 Harvard Law Review, 139, and Unfair Competition, 10 Harvard Law Review, 275. Valuable notes on this same subject appear at 18 Yale Law Journal, 50; Idem, 554; 26 Harvard Law Review, 442; 32 Harvard Law Review, 181.

The leading case in California is Weinstock v. Marks (1895) 109 Cal. 529, 42 Pac. 142, 50 Am. St. Rep. 57, 30 L. R. A. 182.

[11] 38 Cyc. 756, and cases there cited; Nims on Unfair Competition in Business, p. 8. See 4 Cornell Law Quarterly, 225.

[12] See Robert L. Munger, "Unfair Methods of Competition," 25 Yale Law Journal, 20, where the circumstances surrounding the adoption of this language by Congress are set forth.

sion,[13] the court is, for the first time, given opportunity to make answer. That case arose under the following facts: Sears, Roebuck & Company, a mail order house which advertises extensively, over a period of years sold sugar below current market quotations and at a very considerable loss. Its catalogues set forth that large scale buying enabled it to offer commodities at prices better than those of its competitors. Representations were also made concerning the teas and coffees in which the company dealt, to the effect that these were carefully tested and selected in manner described. By using sugar as a "leader," and allowing a limited quantity thereof to be bought in connection with purchases of other articles, the company was enabled to make a satisfactory profit upon the entire transaction. The customer was not informed that the sugar and other goods were sold upon different bases.

The trade commission, following a hearing wherein it found that the company purchased all its wares in open market at prevailing prices, and without particularly selecting any of them, issued an order commanding the company to desist from circulating catalogues wherein were statements inducing the public to believe that large scale buying enabled it to offer sugar within the United States at prices lower than its competitors, from selling sugar in the United States "below cost," from representing that its competitors did not deal fairly with their customers, and from misrepresenting the manner in which its teas and coffees were selected.

The company filed a petition for review. The circuit court of appeals struck from the order that portion which forbade the company to sell sugar "below cost," saying that an owner of property cannot be restrained from selling it an any price satisfactory to himself, or from giving it away if he chooses. Otherwise the order was allowed to stand.[14]

In construing the sections of the act to which particular reference has hereinbefore been made, the court stated that the commissioners "representing the government as parens patriae are to exercise their common sense, as informed by their general idea of unfair trade at common law, to stop all those trade practices that have a tendency to injure competitors directly or

[13] (April 29, 1919) 258 Fed. 307. The case is commented upon in 88 Central Law Journal, 425, in 29 Yale Law Journal, 125, and in 18 Michigan Law Review, 71.

[14] Alschuler, Circuit Judge, dissents in part, arguing that the portion of the order forbidding representations by Sears, Roebuck & Co. that its competitors did not deal fairly with their customers should be stricken out. This portion of the order was apparently based upon an advertisement relative to the difference between beet and cane sugar, stating that a smaller price should be exacted for the former, that Sears, Roebuck & Co. always plainly labelled their sugar as cane or beet, and raising the question whether this practice was followed by other firms.

through the deception of purchasers. . . . . But the restraining order is merely provisional. The trader is entitled to his day in court, and there the same principles and tests which have been applied under the common law . . . ." will control.

To the seeker after understanding concerning powers of the trade commission such language is of scant assistance, because, as has been pointed out by a writer of a recent comment thereupon,[15] it involves a manifest paradox. For certainly the facts would have supported no such holding at common law. There could have been no action of deceit, for it is essential thereunto that there have been misrepresentation upon which someone relied to his damage,[16] a fact which is not here presented, and, in the absence of any element approximating "passing off," the practices herein branded as obnoxious could not have been enjoined as "unfair trade."[17] So in this particular trader's "day in court," it is apparent that common law principles did not control.

The language of the court is consequently at direct variance with its holding. It says that the "common law" controls; it holds that the "common sense" of the commissioners fulfills that same function. And loose reference to "the general idea of unfair trade at common law," coupled with failure to attribute significance to the expression of which Congress designedly made choice,[18] "unfair methods of competition in commerce," is most disappointing.

However, as between the court's language and the court's holding, the latter speaks the louder, and upon the basis of the holding, as distinguished from the language, the case falls within the spirit of the statute. For the holding sanctions a departure from the common law without attempting to say how far that departure is to go: assisting only to the extent that a decision upon the facts is assistance, therefore, the court leaves the question as it was originally presented—what practices may the commission prohibit as being "unfair methods of competition in commerce?" The answer thereto should flow from the sentiments and tendencies of the age applied to the provisions of the statute itself, and it is believed that the pronouncements of the courts will frame that answer upon those foundations.

In the trade commission act Congress has declared a policy sanctioned by the *mores* of the times, the details of which it of necessity could not antecedently prescribe. The task of clothing this policy with the garment of detail necessary to its presentation before the twentieth century world of business, and of altering that garment to conform to changing standards

[15] 88 Central Law Journal, 425.
[16] Francis M. Burdick, Law of Torts, §§ 433, 455.
[17] See authorities cited supra, n. 10.
[18] Supra, n. 13.

of commercial ethics, it has entrusted to an administrative body, which is "invested with the power to ascertain the facts and conditions to which the policy and principles apply."[19] The limitation upon the power so granted is the "common sense" of that body, restrained and guided by the supervising hand of the court in those cases where its "common sense" would prescribe courses of conduct too greatly at variance with the "common sense" of the remainder of the community.[20]

E. M. P.

ADMIRALTY: LIABILITY OF VESSEL REQUISITIONED BY THE UNITED STATES UNDER THE SHIPPING ACT.—Courts have often drawn a distinction between suits against property owned by a sovereign where it was being used in public business, and where it was being used in private or commercial matters, the sovereign's immunity being denied in the latter case.[1] There was some doubt whether the same distinction was recognized by Congress in the act creating the United States Shipping Board, wherein it was provided in regard to requisitioned ships: "Such vessels while employed solely as merchant vessels shall be subject to all laws, regulations, and liabilities governing merchant vessels, whether the United States be interested therein as owner, in whole or in part, or hold any mortgage, lien, or other interest therein."[2] The importance of this question is apparent to everyone who

[19] Mr. Justice McKenna in Mutual Film Co. v. Ohio Indust'l. Comm. (1914) 236 U. S. 230, 59 L. Ed. 552, 35 Sup. Ct. Rep. 387, upholding an Ohio statute granting to an administrative body the authority to sit in censorship upon moving pictures to be displayed in the state.

[20] Interesting developments in this connection may be expected as a result of recent activities of the commission in question concerning resale price maintenance. Generally speaking it has been a principle of our law that the government shall not select a trader's customers for him. Great Atlantic and Pacific Tea Co. v. Cream of Wheat Co. (1915) 224 Fed. 566, affirmed 227 Fed. 46. The cases are collected by Rome G. Brown, The Right to Refuse to Sell, 25 Yale Law Journal, 194. Yet In re Auto Strop Razor Co. and In re Clayton F. Summy Co., Federal Trade Commission Bulletin, April 22, 1919, are cases wherein the commission has forbidden the manufacturer to stop selling to jobbers who refused to sell at prices prescribed by the manufacturer. Query as to the enforceability of the commission's order? No prosecution lies for refusal to sell under these circumstances either under the Sherman Act, U. S. v. Colgate & Co. (1918) 253 Fed. 522; or under the Clayton Act, Baran v. Goodyear Tire & Rubber Co. (1919) 256 Fed. 570. See comment on these cases at 28 Yale Law Journal, 505. On this general subject see W. H. S. Stevens, Resale Price Maintenance as Unfair Competition, 19 Columbia Law Review, 265.

[1] The Davis (1870) 10 Wall 15, 19 L. Ed. 875.

[2] Act of September 7, 1916, ch. 451, § 9, 39 U. S. Stats. at L. 730; Fed. Stats. Ann., 1918 Supp., p. 789.